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# SEIZING

# BOOKS AND PAPERS

UNDER THE

# REVENUE LAWS.

PUBLISHED BY THE NEW YORK CHAMBER OF COMMERCE.

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# A DISCUSSION

OF THE

# CONSTITUTIONALITY OF THE ACT OF CONGRESS

OF MARCH 2, 1867,

## AUTHORIZING THE SEIZURE OF BOOKS AND PAPERS

FOR

ALLEGED FRAUDS UPON THE REVENUE,

TOGETHER WITH

A BRIEF STATEMENT OF CERTAIN OBJECTIONS TO THE PRACTICAL WORKING OF THE LAW.

BY

S. B. EATON,

OF THE NEW YORK BAR.

NEW YORK:
PRESS OF THE CHAMBER OF COMMERCE.
1874.

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This pamphlet is published at the request of the Special Committee upon Revenue Reform of the New York Chamber of Commerce.

The writer desires to express his acknowledgments for suggestions derived from the printed report of the argument of Mr. Sidney Webster, in 1867, upon the old law; and from the pamphlet of Mr. Cephas Brainerd, in 1870, upon proposed amendments to the present law.

S. B E.

February 2, 1874.

346 Broadway.

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An informer intimates to a Revenue official that an importer has defrauded the Government in the matter of duties on imports; the official, upon complaint and affidavit, obtains from the Judge of the District Court of the United States a secret warrant to seize the books and papers of the importer; the books and papers are seized, and are carried away to be examined, for the ostensible purpose of investigating the alleged fraud. Such, briefly stated, is the process usually denominated *Seizing books and papers by the Custom House*, the full purport of which will be laid open in these pages, together with certain first principles of law which, it is believed, that process violates.

The first statute ever passed by Congress authorizing these seizures was that of March 3, 1863.* Subsequently that law was amended by the Act of March 2d, 1867, which is still in force,† the section authorizing seizures being appended:

"Whenever it shall be made to appear to the satisfaction of the Judge of the District Court for any district of the United States, by complaint or affidavit, that any fraud on the revenue has been committed by any person or persons interested or in any way engaged in the importation or entry of merchandise at any port within such district, said Judge shall forthwith issue his warrant, directed to the Marshal of the district, requiring said Marshal, by himself or Deputy, to enter any place or premises where any in

* 12 Stat. at Large, 737.
† 14 Stat. at Large, 546.

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voices, books, or papers are deposited relating to the merchandise in respect to which such fraud is alleged to have been committed, and to take possession of such books or papers, and produce them before the said Judge; and any invoices, books, or papers so seized shall be subject to the order of said Judge, who shall allow the examination of the same by the Collector of Customs of the port into which the alleged fraudulent importation shall be made, or by any officer duly authorized by said Collector. And such invoices, books, or papers may be retained by said Judge as long as in his opinion the retention thereof may be necessary; but no warrant for such seizure shall be issued unless the complainant shall set forth the character of the fraud alleged, the nature of the same, and the importations in respect to which it was committed, and the papers to be seized. And the warrant issued on such complaint, with report of service and proceedings thereon, shall be returned, as other warrants, to the Court of the District within which such Judge presides."

Precisely what this law is designed to accomplish can be best seen by contrasting it with the law authorizing the seizure of *goods and merchandise.* Under section 68 of the Act of Congress passed March 2d, 1799*, every Collector, Naval Officer, and Surveyor, having cause to suspect a concealment in a particular building of any goods subject to duty, is, upon proper application on oath to any Justice of the Peace, entitled to a warrant to enter such building, and there to search for such goods, and "to seize and secure the same for trial." These provisions, found in our earliest statutes, and incident to all laws imposing and collecting duties, are as old as Revenue law itself. They are meant to check fraud by authorizing the seizure and condemnation of the *inculpated goods*, and are enforced upon the

1 Stat. at Large, 678.

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theory that the *specific goods and merchandise*, upon which the proper duties are not paid, are subject to seizure and confiscation.

The seizure of *books and papers* is a proceeding of an entirely different nature. The only value of the books seized consists in the information they contain, and the only object of the Government in seizing them is to use them as evidence against their owner. After their contents have been exhausted, and after whatever secrets they may contain have been turned against the party from whom they are taken, they are restored. In the one class of seizures, specific goods and merchandise, inculpated by the fact that the proper duties were evaded, are taken and sold for the benefit of the government. In the other class of seizures, books and papers containing the records of business transactions, are taken and examined to discover what evidence of fraud upon the Revenue law they will reveal. In one case, the official is authorized to search, seize, and carry away *merchandise which is liable to be confiscated*, to be held *for trial;* in the other case he is authorized to seize *private papers, not liable to confiscation*, and hold them *as evidence.*

The terrible consequences entailed by the seizures authorized by this law can hardly be overstated. When the counting room is invaded, and its entire contents removed, the heart of a business is struck. Entanglement easily follows in every branch, and traffic is practically suspended. In suits between private parties, the public takes little interest, but when the government begins proceedings against a man, it raises in the popular mind a strong presumption of his guilt. "There is," as a recent writer has very pointedly put it, "a traditional prejudice that such proceedings, being undertaken on public grounds, and in the public interest, can not be dictated by private malignity or passion, and must have an array of facts behind them;" so that when the

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"Custom House," or the "Special Agent" seizes on the books and papers of an importer, on account of alleged fraud, and the telegraph spreads the news over the country, the fair fame of a lifetime often vanishes in a moment. 'Character is damaged to an extent which no subsequent refutation or vindication can wholly cure, because such are the intricacy and obscurity of our Revenue laws that, even if the facts are clear of all suspicion, the defence must, from the nature of the case, be dry and tedious reading, while the charge can be contained in two lines of a spicy dispatch."* Laws authorizing such oppressive proceedings, and entailing such consequences, should have the undoubted sanctions of necessity, experience, and obvious constitutionality.

The language of the statute is, that when it shall appear that "*any fraud* on the Revenue has been committed," the books and papers of the party committing the same shall be seized. Fraud, then, is the essence of these proceedings. Ordinarily, there can be no honest doubt in any man's mind as to whether or not he is guilty of fraud. Deception by which an unfair advantage is deliberately gained, or artifice by which another is intentionally injured, are universally known to constitute fraudulent practices; and, where the law punishes fraud, any one, ordinarily, can so govern his conduct as to either incur the penalty, or escape it. This is not true, however, with reference to "fraud" as the word is used in the statute now under consideration. Certainty as to whether "any fraud upon the Revenue is being committed," so far at least as to place it beyond doubt whether books and papers are liable to be seized, depends upon a complete and correct knowledge of Revenue law. Not only is this so, but it is indispensable that, in addition to a correct reading of the

* The Nation, vol. 16, p. 312.

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law, the interpretation placed upon it should coincide with that held by the official in whose hands rests the seizing power. The reason for this is found in the very nature of the case. At the inception of seizure proceedings, the *motives* of the importer who is charged with fraud, are seldom in question. Nothing is positively known about them, and it is against the pecuniary interest of the seizing officer to give the importer the benefit of a doubt. The question is one simply of *fact*. The point is this: does the seizing officer, upon such information as comes to him, and as he construes the Revenue Laws, believe that the importer has violated them? If he so believes, he will, ordinarily, take the proper steps to have the seizure made. It becomes, therefore, necessary to know whether the Revenue laws are free from ambiguities, and are readily understood by those who must use them, since such authorities as both Marshall and Story hold that "a doubt as to the true construction of the law is as reasonable a cause for seizure as a doubt respecting the fact."*

The opinion of the Secretary of the Treasury is pertinent upon this point. In his report at the opening of the present Congress, he said, referring to the complexity of the Revenue laws:

"There is often a direct conflict between different statutes, and, occasionally, between two or more provisions of the same statute, *while single provisions are frequently held to embrace different meanings.* These differences can be settled only by arbitrary interpretations, or by adjudications in courts." The number of appeals to the Secretary for "*arbitrary interpretations*," the last year, on account of these "*different meanings*," was nearly five thousand.

Said Secretary McCullough, in his report to Congress, in 1867:

* U. S. *v.* Riddle, 5 Cranch, 311. The schooner *Friendship*, 1 Gallison, 112.

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"The laws relating to the foreign and coasting trade, and the collection of the Revenue from customs, are now dispersed through many volumes of statutes, and have been so frequently modified by amendments of their original provisions, that *on many points it is difficult for merchants, as well as for the officers whose duty it is to construe and execute them, to determine what is the law in force.* It is of great importance that laws regulating interests so various and vast, should be so systematized that the rights and duties of the classes whose interests are most directly affected by them may be clearly apparent. Their present compliance is a source of serious embarrassment to the mercantile community, and it is not less embarrassing to the officers of Customs. The Department has endeavored to obviate these embarrassments as far as practicable by regulations and instruction, but these measures are only a partial remedy, and fall far short of supplying the want of a uniform and consistent code."

Said one of the Associate Justices of the United States Supreme Court, "It is a great grievance that the Revenue laws passed by Congress have become so numerous and complicated that it is often difficult to ascertain what is the existing law on any particular subject. In the construction of other laws, when one statute supplies or changes the provisions of another, the latest is construed as a repeal of the former. But in the construction of this mass of contradictory Revenue laws, it would seem that the statute which gives the *highest duty, the largest fees, or the severest penalties*, is never repealed by a later act which mitigates the penalty or diminishes the fees. Acts giving certain fees, or *forfeitures* to *certain officers* become almost like the laws of the Medes and Persians, incapable of being repealed."

It thus appears that the Revenue laws are not free from ambiguities, and can not be clearly understood. The Trea-

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sury Department itself can not always read the law aright, and it often happens that official interpretations, issued in the morning, are recalled before night, while regulations sent by mail are annulled by telegraph. Instead of one concise code, we have statute piled upon statute, beginning in the last century and lasting until now, in consequence of which the law has become so complicated that it is within bounds to say nobody has a perfectly clear comprehension of all its requirements, provisions, and interpretations. The law requires* invoices, oaths, certificates, and declarations, not once only, but sometimes in duplicate, and sometimes in triplicate, of consignors, consuls, owners, agents, purchasers, and consignees, regarding the most minute particulars of cost, market value, freights, inland and innumerable other charges, in respect to any of which particulars a single error, no matter how unimportant, renders an importer's books and papers liable to seizure. It does not seem unreasonable, therefore, to claim with reference to the use of the words "*any fraud*" in the statute authorizing seizures, that, so far as seizing books and papers is concerned, any act of omission or commission, which involves a breach of the Revenue law, is "*fraud*," no matter whether the act occurs through accident, negligence, ignorance, or innocent mistake, or even through a mere technicality.

The question whether the importer *intentionally* violates the Revenue law, and whether he *knowingly* evades paying duty, can not be absolutely determined until after the books are seized, and the allegation with reference to which they are taken is examined. The law, however, from the outset, creates a bias in the minds of the officers having charge of the seizure and the examination, against the importer, countenancing, in the recent words of one of our Judges, "sinister inquisitiveness and mischievous espion-

* Act of Congress, March 3, 1863.

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age." If the alleged fraud is substantiated, or if the merchant's alleged offense is condoned by his paying a penalty, a part of the penalty paid goes to those who have instigated, and to those who have engineered the seizure. That amount, moreover, is not the value of the *single item* in reference to which the fraud is alleged, but is the value of the *entire face of the invoice* in which the item is included. Of this sum, one-half goes to the Government, one quarter to the informer, one-quarter is equally divided between the Collector, the Surveyor, and the Naval Officer of the port, while, out of the gross sum, percentages fall to the prosecuting officer of the government and to the Clerk of the Court. Human nature can hardly be trusted, under these circumstances, to give to an importer the benefit of a doubt as to his *intention*—every official with whom he comes in contact, except the Judge, and the Secretary of the Treasury, having a direct pecuniary interest against him. "Let the law be amended," to use the forcible language of Mr. Schultz, in his recent address upon this subject before the Chamber of Commerce "so that these two functionaries can receive a portion of the moieties, and then, so far as human motive can be controlled by sordid influences, a perfect system of confiscation exists."

Let us consider for a moment the oppressive features of this law. Technical and unintentional errors, and sometimes even the bare suspicion of them, subject houses and stores to search, and books and papers, with every vestige of correspondence, whether it may be of a business or private nature, to seizure and removal. Not only merchants, but any one who has been interested in any importation of any kind, are in danger. If the seized records fail to establish the existence of the alleged fraud, they can be ransacked for proof of other frauds, and whatever is found must be condoned by the payment of a penalty utterly disproportionate to the loss of customs duty. If this legal ex-

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tortion is resisted, the amount is sued for in the courts; and, in a trial, where for one dollar lost to the Revenue, one thousand dollars, to state what is within bounds, is sued for, the contents of the books and papers of the accused are used in evidence against him. Think of invading a man's house, under cover of law, for such a purpose! Think of the terror such laws inspire! In the same breath men stigmatize them, yet confess they dare not speak openly. Thus Commerce is at the mercy of the Revenue officials, and an importer is as likely to publish his grievances, as an unbeliever, in the twelfth century, after having made an enforced perambulation through the halls of the Spanish Inquisition, would have been likely to accurse the religion of the State.

Having thus briefly seen the real scope of the law authorizing the seizure of books and papers, together with the oppressive and inquisitorial proceedings instituted under it, let us now approach the real body of our subject. The first branch of this discussion resolves itself into this:

Has Congress the constitutional right to compel a party, accused of having incurred a Revenue penalty or forfeiture, or of having rendered himself liable to indictment therefor, to produce, or to give up papers in his possession, made by himself or others, which are alleged to contain proof of his offense, and which are to be used in evidence against him?

The whole power of Congress in this matter is found in the following clauses of the Constitution:*

"The Congress shall have power:

"To lay and collect taxes, duties, imposts, and excises;" and

"To make all laws which shall be necessary and proper for carrying into execution the foregoing powers."

* Constitution, Art. 1, Sec. 8.

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It there is any limitation imposed upon Congress in its exercise of these powers, speaking with reference only to the Seizure Laws, it is found in the following Amendments to the Constitution :

" The right of the people to be secure in their persons, houses, *papers*, and effects, against *unreasonable searches and seizures*, shall not be violated ; and no warrant shall issue but upon probable cause, supported by oath or affirmation, and *particularly describing* the place to be searched, and the persons or things to be seized."

" No person shall be deprived of life, liberty, or property *without due process of law*."*

It will be herein contended that these Amendments impose such limitations upon Congress, as should prevent that body from enacting such a law as the one now under discussion, and that, therefore, this law should be at once repealed as unconstitutional.

In establishing this proposition, brief reference must first be made to some of the causes which led to the adoption of these amendments.

Opposition to the adoption of the Constitution sprang from two causes: first, an apprehension that the right of the States to manage their local affairs, was not sufficiently secured to them; and, second, solicitude in regard to the sanctions of civil liberty, including especially security for persons and property against the power of the general Government. This opposition prevented some of the States from approving, until amendments were provided for, designed to remove these objections; and it was only on the assurances that such provisions should be made, that the adoption of the Constitution was finally, and with great difficulty, accomplished. These amendments were introduced by Mr. Madison. The

* Amendments to Constitution IV. V.

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reason for their introduction was stated to be the hostility developed in the State conventions against the unlimited powers given to the general Government, and they were distinctly intended for the sole purpose of removing that hostility by restricting and limiting those powers. This is shown by the preamble prefixed to these amendments as adopted by Congress. It is found in the journal of the Federal Convention, as published in conformity with the resolution of Congress, and is as follows:

"The convention of a number of the States having, at the time of their adopting the Constitution, expressed a desire, in order to prevent misconstruction or abuse of its powers, that further declaratory and restrictive clauses should be added; and, as extending the grounds of public confidence in the Government will best insure the beneficent ends of its institution, it is resolved that the following articles be proposed."

These amendments were designed to accomplish: first, State independence in local affairs; second, freedom of religion, of speech, and of the press; third, trial by jury; and fourth, security for persons, houses, papers, and effects from unreasonable searches and seizures, including a denial of power in the new Government to deprive a citizen of life, liberty, or property "without due process of law."

In this brief review, the intention of the people in passing the amendments can be clearly seen. Additional sanctions were demanded for popular rights. Especially were the rights of personal liberty and of property to be more firmly secured, the intention being plainly stated in the declaration that no person should be deprived of them "*without due process of law.*"

Fortunately for our purpose, the meaning of the phrase "*due process of law*" has been clearly established. The highest Court of the land has defined it. Said Mr. Justice Curtis:

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"The Constitution contains no description of those processes which it was intended to allow or forbid. It does not even declare what principles are to be applied to ascertain whether it be 'due process.' It is manifest that it was not left to the legislative power to enact any process which might be devised. The article is a restraint on the legislative, as well as on the executive and judicial powers of the government, and can not be so construed as to leave Congress free to make any process '*due process of law*,' by its mere will. To what principles then are we to resort to ascertain whether this process, enacted by Congress, is 'due process'? To this the answer must be twofold. We must examine the Constitution itself to see whether this process be in conflict with any of its provisions; if not found to be so, we must look to those settled usages and modes of proceeding existing in the Common and Statute Law of England, before the emigration of our ancestors."*

Adopting this interpetation of the words "*due process of law*," the next step is to inquire how this Act, authorizing the seizure of books and papers, comports with "those settled usages and modes of proceeding existing in the Common and Statute Law of England," prior to, and contemporaneous with, the adoption of the Constitution.

Blackstone defines the Common Law to be a collection of customs and maxims, which have acquired the force of law by immemorial usage, recognized and declared by judicial decisions, and the best evidence of which is to be found in the reports of such decisions, and in the standard treatises.

Turning to the Common Law, the books tell us that one of the fundamental principles, rooted in the jurisprudence alike of England and America, is that *no man should be compelled*

* Case, Murray's lessee. 18 Howard, 276. Also, Taylor *v.* Porter, Bronson, J. 4 Hill, 146.

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*to accuse himself.* So well established is this rule, that the words, *Nemo tenetur se ipsum accusare*, are among the oldest maxims. Whatever may be the usage under the statute law of the Continent, there is no dispute that in this country no man is bound to furnish evidence to condemn himself. In all the fluctuations in the rules of law in the past, no change has ever been made in this principle, further than to *permit* the accused voluntarily to give evidence against himself: never *compelling* him to do so.

Mr. Chief Justice Marshall said, in the "case of Willie":* "It is a settled maxim of law, that *no man is bound to criminate himself.* This maxim confirms one exception to the general rule, which declares that every person is compellable to bear testimony in a court of justice. . . . Many links frequently compose that chain of testimony which is necessary to convict any individual of a crime. It appears to the court to be the true sense of the rule that no witness is compellable to furnish any one of them against himself."

As long ago as the year 1680, it was held in the High Court of Chancery in England, that the defendant need not answer a bill for discovery, where his plea would *subject him to a forfeiture.*† Accompanying the report of that case is a multitude of references establishing the same principle. A few years later, in 1736, Lord Chancellor Hardwicke said: "There is no rule better established in equity than that *a person shall not be obliged to discover what may subject him to a penalty, or any thing in the nature of a penalty.*"‡

This same principle is incorporated into the municipal law of the State of New York, which provides that: "Any competent witness in a cause shall not be excused from answer-

* 2 Burr's Trial, 243.

† Bird *v.* Hardwicke, 1 Vernon Chan. Cases, 110.

‡ Smith *v.* Read, 1 Atkyn's Reports, 527.

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ing a question relevant to the matter in issue, on the ground merely that the answer to such question may establish, or tend to establish, that such witness owes a debt, or is otherwise subject to a civil suit. But this provision shall not be construed to require a witness to give any answer which will have a tendency to accuse himself of any crime or misdemeanor, *or to expose him to any penalty or forfeiture*, nor in any respect to vary or alter any other rule respecting the examination of witnesses."*

Said Chancellor Kent: "There are numerous cases establishing the rule that no one is bound to answer so as to subject himself, either directly or eventually, *to a forfeiture or penalty*, or any thing in the nature of a forfeiture or penalty."†

Said Chancellor Walworth: "The Constitution has wisely provided that a party shall not be compelled, in a criminal case, to be a witness against himself. And this principle, by the Common Law, *was extended to proceedings in civil cases*, where the witness was called upon to make a disclosure which might subject him *to a forfeiture or penalty, or to any loss in the nature of a penalty.*"‡

In the standard treatises on evidence, the same rule is laid down as follows: "The witness is privileged from answering a question, the answering of which might subject him to a *penalty or forfeiture* of any kind."§ Further: "Where an answer will subject a witness to a *forfeiture of any portion of his property*, he is not bound to answer, any more than in a case of exposure to a criminal prosecution or penalty. This rule holds good alike in equity and in law."‖ There is indeed no limit to the number and value of the authorities on this point.

* Rev. Stat. New-York, Part 3, Chap. VII., Art. 8, Sec. 71.

† Livingston *v.* Tompkins, 4 Johnson's Chancery Reports, 431.

‡ Livingston *v.* Harris, 3 Paige, 534.

§ Phillips on Evidence, vol. 2, p. 396.

‖ 1 Greenleaf on Evidence, § 451, and authorities there collected.

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As to the opinion of the founders of the Government, there is no room for doubt. The whole subject of the discovery of evidence was considered during the earlier sessions of Congress, and means provided for compelling the production of books and papers, carefully, however, excluding self-condemnation by the accused. In the Judiciary Act of 1789, Congress enacted that the Federal Courts shall have power, in trials of actions at law, on motion and due notice thereof being given, to require the parties to produce books or writings in their possession or power, which contain evidence pertaining to the issue, in cases and under circumstances where they might be compelled to produce the same by "*the ordinary rules of proceedings in Chancery.*" Under this Act, the production of books and papers is compellable: first, only for the purposes of the trial of actions; second, only when such books and papers contain evidence pertinent to the issue; third, only upon motion and due notice; and, fourth, only in cases and under circumstances where their production could be compelled "by the ordinary rules of chancery proceedings."

The repugnance between these long established statutory provisions for the production of evidence, and those contained in the recent Act now being considered, requires but brief notice. In the latter case, there is no action; the seizure is entirely *ex parte;* there is no opportunity given to the accused to show cause why the seizure should not be made; and the sole object of the seizure is to compel the party to criminate himself, or to bring upon himself a penalty or forfeiture. In each of these respects, the proceedings authorized by the Act are in direct antagonism to those contemplated by the Fathers of the Republic.

What is meant "*by the ordinary rules of proceedings in chancery*" is easily settled. The same sources to which Blackstone commends us to ascertain what is the Common Law, are to be resorted to here. Fonblanque, one of the



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greatest masters of Equity Jurisprudence, speaking of the objects of a Court of Equity in enforcing discovery, uses this language: "It may also happen that the situation of the defendant may render it improper for the court to enforce a discovery, as when *the discovery may subject the defendant to pains and penalty, or to a forfeiture, or to something in the nature of a forfeiture.*"* Said Judge Betts, in a case where a motion was made, under the statute of 1789, that parties be ordered to produce their books of account: "The effect of the evidence sought for will be not only to enable the plaintiff to recover his entire damages, but the direct consequence will be to *subject the defendants to a penalty* of three times the amount of those damages . . . We think it against the rules of equity to allow a bill of discovery in such a case, unless the bill relinquishes all claim to the penalty which may be superinduced by the production and exhibition of the books."† Phillips says: "In the courts of equity, it is an established principle that a party is not bound to answer so as to *subject himself to pains, penalties, or to any kind of punishment, or to any forfeiture.*"‡ Story says: "Courts of Equity will not entertain a bill for a discovery to aid the promotion or defense of any suit which is not *purely* of a civil nature, for *it is against the genius of the Common Law to compel a party to accuse himself, and it is against the general principles of equity to aid in the enforcement of penalties or forfeitures.*"§ The cases cited by this learned jurist, in his references, are very full.

Mitford claims: "The situation of a defendant may render it improper for a court of equity to compel a discovery, because the discovery may subject the defendant to pains

* Treatise on Equity, p. 495.

† Finch *v.* Rikeman, 2 Blatchford, 301.

‡ 2 Phillips on Evidence, 937.

§ 2 Story's Equity Jurisprudence, § 1494.

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or penalties, or to some forfeiture, or something in the nature of a forfeiture. *It is a general rule that no one is bound to answer so as to subject himself to punishment, whatever may be the nature of the punishment.*"* Story again says: "The rule is that the defendant shall not be obliged to discover what *may* subject him to a penalty or forfeiture, or criminal accusation, and not what *must* only."† Numerous English authorities on this point are collected by Mr. Raithby, in his note to Bird *v.* Harwicke, 1 Vernon, 110.

A decision of Judge Hopkinson is especially pertinent, it having been given upon a suit to enforce a Revenue forfeiture, and is as follows: "The courts of the United States have the power given to them to require parties to produce books and writings in their possession or power, which contain evidence pertinent to the issue in the case, and under circumstances where they might be compelled to produce the same 'by the ordinary rules of proceedings in Chancery.' Is this such a case? *Would a Court of Chancery, on a bill of discovery, compel a party to produce evidence which would subject him to a forfeiture? I think not.* No such order has been shown from a Court of Equity, and the authorities hold a different doctrine."‡

The furthest that any court has ever gone against this principle, prior to the enactment of the present Seizure Law, was in a case in which Mr. Justice Nelson delivered the opinion, holding that where a claimant of merchandise, sued for a fraudulent violation of the Revenue law, has the burden of proof imposed upon him by the Court, according to the 71st section of the Collection Act of 1799,§ it is no error for the Judge to instruct the

* Mitford's Chancery Pleadings, p. 194.

† Story's Equity Pleadings, § 575.

‡ U. S. *v.* Twenty-eight Packages of Pins, Gilpin's Reports, 312.

§ 1 Stat. at Large, p. 627.

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jury, that, if such claimant refuses to produce his books and papers as evidence of his accounts and transactions with parties abroad, from whom the goods were purchased, then the jury are at liberty to presume that his books and papers would have operated unfavorably on his case, if produced.

It thus appears, that no such power as that claimed under the Act now under discussion, is to be found in the Common Law, or in the "*ordinary proceedings of a Chancery court.*" No such provision for discovering evidence has ever before found a place in our jurisprudence. In these recent Acts alone, *and for the first time*, Congress attempts to accomplish, by indirect means, for the prosecuting officers of the Government, what it has never accomplished before, and what, under the Judiciary Act, with all its amendments, could never be accomplished directly, either on a trial or in preparation for a trial.

Provisions analogous, in some degree, to those contained in the law authorizing the seizure of books, in the event of frauds upon the Revenue, have been enacted by Congress, for the benefit of the Department of Internal Revenue. In 1868, it was enacted that, in case any person neglected to make his annual return to the Assistant Assessor of Internal Revenue, and, upon being summoned to appear, refused to do so, the official might apply to the Judge of the District Court, or to the Commissioner of the Circuit Court of the United States, for an attachment; and the recalcitrant person should be compelled to appear and *to bring* his books of account for the purpose of examination.* It was also enacted that a Commissioner of Internal Revenue, for the purpose of detecting frauds in relation thereto, could likewise summon any person *to produce* his books, and could compel a compliance with such summons. These

* 14 Stat. at Large, 101.

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laws produced much irritation and much opposition, and the officials frequently found it necessary to seek the assistance of the courts in enforcing them.

While the principles involved in the legal discussion of these questions connected with the Internal Revenue Acts, are not identical with those already discussed, still they are sufficiently alike to make a brief recital of the more important cases interesting. Before doing so, however, reference must be made to an Act of Congress, which was evidently passed to allay the popular indignation, and meet the legal objections urged against these Seizure Laws. This Act was approved February 25th, 1868, and is as follows:

"No answer or other pleading of any party, and *no discovery or evidence obtained, by means of any judicial proceeding*, from any authority or witness, in this or any foreign country, *shall be given in evidence*, or in any manner used against such party or witness, or his property, or estate, in any court of the United States, or in any proceeding by or before any officer of the United States, in respect to any crime, or *for the enforcement of any penalty or forfeiture*, by reason of any act or omission of such party or witness. Provided, that nothing in this Act shall be construed to exempt any party or witness from prosecution and punishment for the perjury committed by him in discovering or testifying as aforesaid."

In the case of Phillips, where, upon a summons to appear before the Assessor and to answer questions, the party refused to answer, the Judge held that it was no defense for such party, that his answers would tend to criminate himself, inasmuch as no disclosures or admissions so made could be used against him, under the Act above quoted.*

In the case of Strouse, where the party refused to permit

* *In re* Phillips, Underwood, J., 10 Internal Revenue Record, 107.

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an examination of his books, on the ground that the books, if received in evidence, would criminate him, the Judge held that, inasmuch as the testimony obtained from the books would work injury no farther than to increase the party's tax, he should submit to the examination; and that the Act above quoted prevented the disclosures and evidence obtained from the books from being used against him.*

In the Stanwood case, where there was a refusal to submit the books of account of a banking association to the examination of a Supervisor, the Judge said that if the provision of the Constitution, protecting parties against being compelled to produce such papers and documents as may tend to subject them to criminal prosecution applies, they are relieved from such liability by the provisions of the act above quoted, which, the Judge said, was intended to enable the Government, through its officers, to detect and punish frauds by obtaining evidence from those otherwise protected under the provisions of the Constitution.†

Does the statute of February 25th, 1868, above quoted, forbid the use, for purposes of evidence, of books and papers seized under the Customs Seizure Law of March 2d, 1867? This point, it is believed, has not been raised in the United States Court of this District, in such a way as to call for an opinion. In the United States Court of Massachusetts, however, in a recent case of great general interest,‡ it was held by Judge Lowell, that, in view of the existence of this prohibitory statute, it was "*difficult to understand*" how the inspection of books and papers is to be availed by the Government for any useful purpose, *since this Act provides that no evidence thus obtained shall be used for any penalty, or in any criminal action;* that any evidence thus ob-

* *In re* Mark Strouse, Hillyer, J., 1 Sawyer, 605.

† Stanwood *v.* Green, 2 Abbott's Circuit Court Reports, 190.

‡ Bingham *v.* Jordan, Marsh & Co.

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tained might be used to collect duties, or be used by the Collector in his future dealings with the same party or others; but *that it is no part of the law to seize books and papers for the benefit of the Collector, in the administration of his duties as Collector.*

It should be observed that the language of the statute is, that "no evidence obtained by means of *any judicial proceeding*" shall be used against the party. This statute, therefore, can be set up, if at all, only where the books and papers have been taken by a Warrant, and it can have no application whatever, in cases where evidence is obtained by *other than* judicial proceedings, as where importers *voluntarily surrender* their books and papers to the Treasury officials, under threat of seizure in the event of refusal. Moreover, information obtained from the books seized, can be used by the Government, upon the trial, by a skillful concealment of the source from which that information is derived. It would appear that this statute restores to the citizen some part of those rights which the statute relating to seizures took away; but the extent to which it does so is a matter of such uncertainty that the bearing of this statute upon our general discussion, and upon the merits of the Seizing Law, will not be here estimated. Consequently, this discussion proceeds as if there were no such law in existence.

The principles here contended for have not only always been a part of the Common Law, but they are a part of the Statute Law of England, as it now stands. In the reign of George III. it was enacted by Parliament that a witness need not answer a question relevant to the matter in issue, the answering of which has a tendency to accuse himself, or to expose himself to *penalty or forfeiture of any nature* whatsoever, on the ground that the answer of the question will subject him to a civil suit.*

* Stat. 46, George III., ch. 37. 2 Fisher's Digest, 3654.

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How striking is the contrast between this Act and our own legislation! In this respect, the nation has lost by breaking with the Crown, and has destroyed its liberties by becoming a free people. To say nothing of the practical unwisdom of passing this Seizure Law, which affords the Customs officials questionable aid in performing duties which they ought to perform without it, what language is too strong to stigmatize such a departure from the elementary truths of our jurisprudence, and such profanation of the simplest tenets of our political faith. Principles which our ancestors cultivated with reverence, which we imbibed with our earliest education, and which commend themselves to the youth of to-day, by their truth and simplicity, are ruthlessly transgressed. Vast as are the material interests imperiled, how much more deplorable is the reflection, that tame submission to such oppressive proceedings, saps the vitality of a nation. The indignant outburst of Chatham, known to every American schoolboy, and uttered while denouncing a law like this, seems like a reminiscence of freer and braver days:

"Every man's house is called his castle. Why? Because it is surrounded by a moat, or defended by a wall? No! It may be a straw-built hut; the wind may whistle around it, the rain may enter it, but the King can not."

In support of the law authorizing the seizure of books and papers, there can be said to exist one high authority. It is a decision rendered in the Stockwell case.* Said the learned Judge in that case:

"Warrants to search dwelling-houses, stores, buildings, and other places for concealed goods alleged to have been illegally imported, and for the seizure of the goods for trial, have been allowed by law from the organization of the Revenue system to the present time, and it is not per-

* Stockwell *v.* U. S., 12 Internal Revenue Record, 88.

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ceived that any greater objection can be taken to a warrant to search for the books, invoices, and other papers appertaining to an illegal importation, than to one authorizing such a search for imported goods. . . . Suffice it to say that the acts were public wrongs, which subjected the perpetrators to the penalty provided by law, and it is as clearly competent for Congress to authorize the District Judges to issue a warrant in such a case to search for and seize the invoices, books, and papers evidencing such a fraud, as it would be for a State magistrate to grant a warrant to search for and seize stolen goods."

Let us briefly state the difference between the principles contained in this opinion, and those contended for in the authorities previously cited.

When the Constitution was adopted, Search Warrants were in use, and formed a part of the Common Law. This use, however, was confined to a few special cases, where that which was to be seized was the subject-matter of a crime, and where the public, or the complainant, had an interest in it or in its destruction. Those special cases were familiar and well understood in the law. Among them the kind of search now under discussion had no place. Seizing books and papers for Revenue frauds, and using them against their owner, were unknown. Search Warrants were, however, allowed for the following, as well as for some other, purposes, namely: to search for stolen goods, for goods supposed to have been smuggled in violation of the Revenue laws, for implements of gaming or counterfeiting, for forged bills or papers, and for treasonable writings. There were other special cases in addition to these, but they were all well known.* Stolen goods and smuggled goods were the *identical articles;* the *possession* of counterfeit notes and plates were forbidden by statute;

* 4 Broom and Hadley's Commentaries, 333; Burns, Justice of the Peace; Search Warrants.

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and the *writing* of treasonable matter was *in itself* an overt act of treason, and the paper was seized for that reason. In general, such Warrants were confined to cases of public prosecutions, instituted and pursued for the suppression of crime, and the detection and punishment of criminals, and where the thing seized, either was not simply to be used in evidence but to be restored to its owner, or was a part of the *corpus delicti*. Even in those cases, if we may rely on the authority of Lord Coke, the legality of such Warrants was formerly doubted, and Lord Camden said they crept into the law by imperceptible practice. Their legality, however, in these special cases, seems to have been firmly established.

Not only is it true that Search Warrants, known to the Common Law when the Constitution was adopted, were limited to special cases, and to criminal proceedings, but it is also true that the distinction between Civil and Criminal Proceedings was equally well established, and was equally an inherent and fundamental part of the law. Civil courts and Criminal Courts were two distinct systems. They recognized different parties, different objects, different remedies, and different methods. In the Criminal Court, there was the public prosecutor, aiming to suppress crime by convicting and punishing the culprit, proceeding according to well-established legal principles; in the Civil Court, the parties were private individuals, aiming at objects peculiar to their various cases, by means of remedies and methods of procedure peculiar to those courts. If the State entered the Civil Court, it entered it as a private party, the crown and sceptre being left at the gate. The same remedies and the same rules were applied to both parties. The barriers and restraints, which the criminal law had created for the protection of the citizen, were evaded; an indictment by a grand jury was not necessary; pleadings could be amended; and the rule of evidence in criminal causes, that required a

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moral certainty of guilt, was displaced by the less arbitrary rule of simple preponderance of evidence and reasonable probability of truth. On the one hand, the State surrendered the advantages incident to public prosecution, and, on the other, gained the advantages incident to a purely civil tribunal.

The Constitution was framed with reference to the law *as it then was*, and, if the two statements just made are true, the Constitution was adopted with reference to them. When, therefore, that clause was inserted, which says that no person shall be deprived of his property "*without due process of law*," it settled at least two questions beyond the power of Congress to change them: first, that Search Warrants are allowable only in special cases, such as were then well established; and, second, that if the State wishes to avail itself of a Search Warrant in other than these special cases, to do so it must proceed in the Criminal Courts.

It is true that Congress may change the laws of evidence and procedure pertaining to the Civil Courts; but if it does so, it does so for all parties that enter those courts. To legislate that the government shall seize books and papers in civil cases for the purpose of convicting their owner, and to deny that power to other parties, is to create an exception, as well as to confer a privilege, and *that* Congress can not do. *This would not change a rule, but would set aside all rules.*

In this connection, language of the learned writer on constitutional law already quoted from, is of remarkable significance. "The Constitution," he says, "is to be construed in the light of the Common Law, and in the light of the fact that the rules of the Common Law *are still left in force*, and that, in judging what the Constitution means, we are to keep in mind that it is not the *beginning* of law for the State, but that it assumes the *existence* of a well-understood system of Common Law, which is still to remain

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in force and be administered.* . . . We think it would generally be safe for the legislature to regard all those searches and seizures unreasonable, *which have hitherto been unknown to the law*, and, on that account, to abstain from authorizing them, leaving the parties and the public to the accustomed remedies."

As to whether the Statute authorizing the seizure of books and papers is *remedial* or *penal*, it is not material to inquire. The Secretary of the Treasury, himself an able lawyer, in his recent letter to a Committee of the Senate, expressed an opinion that the law "is *both* remedial and preventive." The general drift of the authorities sustains that opinion. As a *remedial* Act the law is an innovation unwarranted by precedent, and is in conflict with the Common Law; and as a *penal* Act, it violates the Constitution, in that it makes an accused party furnish evidence against himself. If the severity of the punishment can be used as a test, by which to determine whether a law is penal, the Statute in question deserves to be classified among the penal Acts. In a well-known case in this city, where books and papers were seized for an alleged fraud on the Revenue, *nearly a million and a half of dollars were claimed, and over a quarter of a million actually paid, for a loss to the Revenue of a little over sixteen hundred dollars.* Fraud in a single item of an invoice of goods, forfeits the entire face of the invoice.

Remembering, with reference to the progress we are making in this discussion, that we are still testing the Seizure Law by the interpretation given by the Supreme Court to the words "*due process of law*"; and that, in accordance with that definition, we are seeking to determine whether seizures were among "those settled usages and modes of proceeding existing in the Common Law when the

* Cooley's Constitutional Limitations, 60.

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Constitution was adopted," let us take a rapid view of what has been held by the Courts on this subject, from a remote period until the present time.

The search of private premises and the seizure of private papers, were early made under General Warrants. Those Warrants were processes issuing from the office of a State Secretary, directing the arrest of any parties, without particularly describing them, who were alleged to be violating certain laws. Writs of Assistance were of a similar nature, and were issued upon oath being made that goods had been landed, without due entry thereof having been first made. These Writs authorized an entry to be made into any house, in the day-time, where goods were suspected to be concealed, and, in case of resistance, to break open such house, and to seize and secure such goods so concealed. Writs of Assistance were introduced in the reign of Charles II., provision being made that no houses should be entered except *within one month* of the supposed offense, and further providing for a remedy against the informer, where the charge proved to be false. Their use was a source of excessive irritation to the Home Government, and they do not appear to have been granted in any of the Colonies, except in rare instances. The Judges, in several of the Colonies, when applied to for Writs of Assistance, refused them, "from a tender regard to the Constitution, and to the rights of American freeholders." In England, the practice of issuing these Writs continued until a much more recent date, when a limit was imposed upon their use, by an order from the Board of Customs, providing that such Writs should not be delivered to any officer, unless he should previously make oath before a magistrate, of his belief, and of the grounds for his belief, that smuggled goods were lodged in a certain house. The first application for a Writ of Assistance, in Massachusetts, is said to have been made in 1754. The outstanding Writs expired after the demise of King George. Upon the

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death of that king, a petition of the merchants of Boston was presented to the court of the Province, asking a hearing on the subject of and against Writs of Assistance. The representative of the Government filed a memorial, praying that counsel might be heard in favor of the Writs, and Mr. Otis, upon whom, as Advocate-General, devolved the task of defending the legality of the Writs, resigned his position rather than perform that duty. He was immediately retained to appear in opposition, by the merchants of Boston, and his memorable speech upon that occasion drew from John Adams the admission that "Mr. Otis's oration against Writs of Assistance breathed into this nation the breath of life." A learned commentator on the Constitution* remarks:

"It is hardly necessary to remind the reader, that one of the immediate causes of the estrangement between the American Colonies and the mother country was the issuing of Writs of Assistance, which were subject to all the objections for which General Warrants had recently been condemned in England."

The hostility to the use of these Writs led to the insertion in the Declarations of Rights, prefixed to the constitutions of different States, of provisions against them. In Massachusetts, for instance, a clause was inserted as follows:

"Every subject has a right to be secure from all unreasonable searches and seizures of his person, his house, and all his possessions. All Warrants, therefore, are contrary to this right, if the cause or foundation of them be not previously supported by oath or affirmation, and if the order in the Warrant to a civil officer to make search in the suspected places, or to arrest one or more suspected persons, or to seize their property, be not accompanied with a *special designation* of the persons or objects of search, arrest, or seizure; and no Warrant ought to be issued but in cases and with the formalities prescribed by law."

* Story on the Const., par. 1901 (n.)

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The substance of this article was incorporated into the Amendment to the Constitution of the United States.

The most noted, as well as the most valuable decision, involving the principles incident to the use of General Warrants and Writs of Assistance, is the case of Entick *v.* Carrington. In that case, the liberty of the citizen, and the immunity of books and papers from seizure and search at the hands of the Government, were asserted by the emphatic judgment of Chief Justice Pratt. This distinguished Judge, afterward Lord Camden, deserves a high place in the regard of every student of Constitutional Government, for his thorough knowledge of, and faith in the fundamental laws of England, no less than for the independence and vigor with which he asserted them. Prior to this case, the numerous actions commenced by Wilkes against those messengers of the Government who had arrested him and carried off his private papers, to be used as evidence, had resulted, first, in favor of heavy damages against the State, and, second, in declaring the warrant and the seizure of papers unconstitutional, illegal, and absolutely void. These decisions received the approval of Lord Mansfield himself.

The case of Entick *v.* Carrington* demands extended notice. It was as follows:

A paper called *The Monitor*, containing reflections upon the Government, had been issued, and the Earl of Halifax, Secretary of State, ordered the seizure of the books and papers of Entick, as a means of determining whether he was one of the writers of the obnoxious articles. Entick brought an action for damages against the King's messengers, who entered his house and seized his papers, claiming that they broke open, read over, and pried into all his private papers and books, and that they carried away many of them, to

* 19 State Trials, 1030, A.D. 1765.

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his damage. In the course of the trial, the counsel for Entick claimed that the power to issue the Warrant under which the seizure was made, was contrary to the genius of the law of England; that the fact that such Warrants had been granted by previous Secretaries of State was no answer to the unconstitutionality in this case, for no usage or continuance could make an unlawful act good; that the *publishing* of the libel was the crime, and not the *having a copy of it locked up* in a private drawer in a man's study; that if having it in his drawer was a crime, no power could break into his house to search for it, in order to use it in evidence against him; and that such a search would be worse than the Spanish Inquisition, for *ransacking a man's secret drawers and boxes to come at evidence against him is like racking his body to come at his secret thoughts.* It was further claimed, that a Search Warrant for stolen goods differs from this seizure in that only the stolen goods are taken, and not all the goods in the house; and that if the stolen goods are not found, all who entered the house are trespassers; and, finally, that the Court, as the protector of the liberty and the property of the subject, should demolish this system of seizures, "which is nothing but a monster of oppression, *and should tear into rags this remnant of Star Chamber tyranny.*"

Lord Camden, Lord Chief Justice, delivered a very lengthy opinion. He held that the great end for which men enter into society is to secure their property; that *papers are the owner's goods and chattels, and are his dearest property, and are so far from enduring a seizure, that they will hardly bear an inspection*; and, though the eye can not, by the laws of England, be guilty of a trespass, yet when private papers are removed and carried away, the secret nature of those goods will be an aggravation of the trespass, and demand more considerable damages in that respect; that if the point in this case should be deter-

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mined in favor of the jurisdiction, the secret cabinets and bureaus of every subject in the kingdom will be thrown open to the search and inspection of a messenger; and that in consequence of it, the house may be searched, the lock and door of every room, box, or trunk broken open, all the papers and books may be seized and carried away, the house rifled, and the most valuable secrets taken out of the possession of their keeper before the charge against him is brought to trial, and before he is convicted. . . "*That there is no process against papers in civil causes; it has been often tried, but never prevailed.*" . . . That it is very certain that the law obligeth no man to accuse himself, because the necessary means of compelling self-accusation, falling upon the innocent as well as the guilty, would be both cruel and unjust, and it should seem that search for evidence is disallowed upon the same principle thereto: the innocent would be confounded with the guilty. . . . "I will always," said Lord Camden, "set my face against these pernicious warrants when they come before me, and should recommend most warmly to the jury always to convict when the proof is clear."

It is stated, that the Lord Chief Justice who delivered the opinions in the two cases above referred to, denying the legality of General Warrants, and explicitly denouncing Search Warrants for private papers, as evidence of crime, was of the opinion, when the question of the discharge of Wilkes on *habeas corpus* was first brought before him, that the warrant for the arrest of Wilkes, and for the seizure of his papers, was legal; and, it is further stated, that the ground upon which he was released from custody, was simply that he was a Member of Parliament. Subsequently, however, when the question of these seizures was argued at length, and the terrible possibilities under them fully exposed, this great Judge condemned, in language of unusual emphasis, the is-



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suing of such warrants as oppressive and unconstitutional, notwithstanding the special verdict of the jury, which is given at length in the report of the case, that many such Warrants had been issued since the rebellion, and notwithstanding the fact that the use of them had been adopted by many of the most popular ministers. He referred the origin of the practice, to borrow the language of Mr. May,* to the Star Chamber, which, in pursuit of libels, had given Search Warrants to their messengers of the press, a practice which, after the abolition of the Star Chamber, had been revived and authorized by the licensing act of Charles II., in the person of the Secretary of State; and he conjectured that this practice had been continued after the expiration of the act—a conjecture shared by Lord Mansfield and the Court of King's Bench. With the unanimous concurrence of the other Judges of his Court, this eminent magistrate finally condemned this dangerous and unconstitutional practice.

Meanwhile, as Mr. May further states, the legality of a General Warrant had been repeatedly discussed in Parliament. While trials were still pending, there were obvious objections to any proceeding by which the judgment of the courts would be anticipated; but, in debate, such a warrant found few supporters. Those who were unwilling to condemn it by a vote of the house, had little to say in its defense. Even the Attorney and Solicitor-General did not venture to pronounce it legal. In 1766, however, the Court of King's Bench had condemned the Warrant, and the objections to a declaratory resolution by Parliament were therefore removed. The Court of Common Pleas had pronounced a Search Warrant for papers to be illegal; and, lastly, the more liberal administration of the Marquis of Rockingham had succeeded to that of Mr. Granville. Ac-

* 2 May's Const. Hist. Eng. 251.

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cordingly, *resolutions were now agreed to condemning General Warrants as illegal, whether for the seizure of persons or papers.**

A bill was introduced to carry into effect these resolutions, and passed by the House of Commons, but was not agreed to by the Lords.† A declaratory Act was, however, no longer necessary; the illegality of the Warrants had been judicially determined, and the judgment of the courts confirmed by the House of Commons, and approved as well by popular opinion as by the first statesmen of the time. The cause of public liberty had been vindicated and was henceforth secure.

Mr. Burke, in his "Short Account of a Late Short Administration,"‡ condenses these great events into two sentences. He says:

"The administration which in July, 1765, came into office under the mediation of the Duke of Cumberland, and was removed July, 1766, under the mediation of the Earl of Chatham, presented in one year, among other resolutions, the following:

"The personal liberty of the subject was confirmed by resolution against General Warrants.

"The lawful secrets of business and friendship were rendered inviolable by the resolution condemning the seizure of papers."

These events occurred in 1765 and 1766, ten years before the Declaration of Independence, and little more than twenty years before the adoption of our Federal Constitution. During these periods, the discussion of the great constitutional principles, settled, in large part, by the cases above referred to, engrossed the attention both of Great Britain and of the American Colonies. When our indepen-

* 16 Parl. His. 209. † Ibid. 210.

‡ Burke's Works, Little, Brown & Co.'s Ed., Vol. I., p. 207.

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dence had been finally established, and the Constitution was to be framed, our fathers went over these great decisions, at the same time with *Magna Charta* and the Bill of Rights, and whatever was found there to favor individual liberty was carefully inserted in their own system—"improved by clearer expression, strengthened by heavier sanctions, and extended by more universal application."

Under this branch of the discussion, but two other illustrations will be given of the abhorrence with which the seizure of books and papers is regarded in the eye of the law. One of the cases referred to is that of Robinson *v.* Richardson (13 Gray's Reports, 454), and was a petition for a Writ of Mandamus, to be addressed to the Judge of Probate and Insolvency, to hear evidence, with a view to his becoming satisfied of the reasonableness of granting to the petitioner a Warrant, to search in the places and for the property and books of account in their said complaint particularly mentioned and described. Under, and in pursuance of, the provisions of the statute of Massachusetts,* it appeared that the petitioners had been duly appointed assignees of the estate of an insolvent debtor, and that they had made and presented to the respondent a written complaint, in due form of law, properly sworn to, representing that there was reasonable cause to believe that certain property and books of account, belonging to the estate they represented, were secreted and concealed in the several places mentioned; and, thereupon, they prayed that a Warrant might be granted, according to the State law, to search for the same. This complaint was received by the respondent, *but he refused to hear the evidence offered in support of the allegation set forth in it, or to issue the Warrant prayed for, in pursuance of the provisions of the appropriate State statute,† upon the ground that the pro-*

* Stat. of Mass. 1859, p. 196.

† Stat. of Mass., 1856, ch. 284, sec. 36.

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*ceedings therein authorized, were in violation of the constitutional right of every citizen, to be secured from all unreasonable searches and seizures of his person, his houses, his papers, and all his possessions.** The decision of the question was referred to a higher court for final adjudication. In the opinion of that court the only question was, whether it is within the constitutional power of the legislature to confer authority upon any magistrate or judicial tribunal, to issue a warrant under the circumstances, or for the purposes enumerated and described, or upon any officer or citizen a right to serve and execute it. The Court said: "Search Warrants were never recognized by the Common Law, as processes which might be availed of by individuals in the course of civil proceedings, or for the maintenance of any mere private right, but their use was confined to cases of public prosecutions, instituted and pursued for the suppression of crime, or the detection and punishment of criminals. Even in those cases, their legality was formerly doubted, but their legality has long been considered to be established, on the ground of public necessity, because without them felons and malefactors would escape detection. The principles upon which the legality of such Warrants could be defended, and the use and purpose to which by the Common Law they were restricted, were well known to the framers of our Constitution. Having this knowledge, it can not be doubted that by the adoption of the fourteenth article of the Declaration of Rights, it was intended strictly and carefully to limit, restrain, and regulate the granting and issuing of Warrants of that character, to the general class of cases in, and to the furtherance of the objects for which they had before been recognized and allowed as justifiable and lawful processes,

* Declaration of Rights, State of Mass., Art. 13.

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and certainly not so to vary, extend, and enlarge the purposes for and occasions on which they might be used, as to make them legal and available in the course of, or for the maintenance of civil proceedings. All searches, therefore, which are instituted and pursued upon the complaint or suggestion of one party, into the house or possessions of another, in order to secure a personal advantage, and not with any design to afford aid in the administration of justice, in reference to acts or offenses in violation of the penal laws, must be held to be unreasonable, and, consequently, under our Constitution, unwarrantable, illegal, and void. The provisions of the statute of 1856, chapter 284, paragraph 36, seem clearly to be obnoxious to this objection. The Search Warrant, which the Judge of Insolvency is thereby, upon the complaint of the assignees of an insolvent debtor, authorized to grant, has no relation to the alleged criminal acts, or to the support of any public prosecution, but is to be used exclusively in mere civil proceedings, and as a remedial process, in cases where nothing but a personal claim or the right to prosecute a civil suit is involved. Any authority given for such purpose, is in violation of the fundamental principle, that every citizen is entitled to be free from all unreasonable searches and seizures of his houses and possessions, and, therefore, it can not lawfully be conferred. . . . The Judge of Insolvency for the County of Middlesex, therefore, rightly refused to grant the prayer of the complainants, as set forth in their complaint; and their present petition for a writ of mandamus must, accordingly, be dismissed."

*The Judge who "rightly refused" to grant an order to search for books and papers, and whose firm stand in behalf of sound constitutional principles was upheld by the appellate tribunal, was The Honorable William A. Richardson, Secretary of the Treasury of the United States.*

The Bill of Rights of the State of New York, contains a

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provision similar in language and purport, to that contained in the Declaration of Rights of the State of Massachusetts, already referred to, and to that used in the fourth article of amendment to the Federal Constitution; and the limitations imposed by this provision upon the various departments of the government, with reference to the subject of inquisitorial searches and arbitrary seizures of private papers, have been, in one instance, thoroughly discussed in this State. That discussion is of special value in this connection, as it meets the argument most often and most urgently used in support of the Seizure Act of 1867, namely, that the seizure of books and papers is justified by the fact that they are to be used for public purposes, in support of public law, and for the public good.

The case referred to arose in this State in the year 1840, and called for an official interpretation of the meaning of the phrase, "*unreasonable searches and seizures.*" It was fully argued on the one side and the other, by Recorder Morris and Attorney-General Willis Wall, and was, in the end, passed upon by Governor Seward, and his decision was approved by the Senate. The facts are these: In October, 1840, Recorder Morris, of the City of New York, received evidence which, in his judgment, tended to establish that a conspiracy had recently existed to violate the election laws, by the importation of voters from Pennsylvania, and had proved successful. Mr. Pierce, a citizen of New York, had in his possession, at his dwelling-house, a packet of letters and papers belonging to, and written by, persons who were supposed to be members of the conspiracy, which had been deposited in his hands for safe keeping. Believing that these papers contained important evidence for the State, the Recorder, in company with the Mayor of the City of New York, went to the house of Mr. Pierce, in the night-time, in their official character, and demanded of him the papers and letters. Mr. Pierce informed these officials

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that he had a bundle of papers, which, he had learned from Glentworth, the accused party, related to transactions which were under investigation before the Recorder, and which were handed to him under a promise, upon his part, that he would retain them for Glentworth, and he therefore refused to hand them over. The Recorder stated to Pierce, that if he did not deliver the packet, he (the Recorder), by virtue of his authority as a magistrate, would search for the papers, and seize them by force. The Recorder avowed these acts in a charge to the Grand Jury. The Governor, under date of December 29th, 1840, thereupon addressed a communication to the Recorder, in reference to this charge, in which he said:

"Every judge or justice of the peace has the same right and power of search that you can lawfully claim, and if the power of search be possessed by such officers, to the extent which you have exercised it, and maintained it before the Grand Jury, the dwellings of our fellow-citizens, whether they be innocent or guilty of offense against the laws, their family affairs, their private transactions, and even the meditations of their hearts, are all exposed at the discretion of a magistrate, and we are without safeguards against oppression and the abuse of power. With these views, I shall deem it my duty to recommend your removal, unless you deny the fact or can change my convictions in respect to the illegality of the specified proceedings."

On January 8th, 1841, the Recorder made a reply to the communication of the Governor, and defended his conduct.

He said that the facts testified to, "established, in his judgment, that there had been a conspiracy to subvert the fundamental principles of our Republican Government;" that he deemed it his duty "to make every legal effort to obtain the receipts for money paid for illegal votes before they should be destroyed." He admitted that a "search-warrant can not issue to take the property of the accused," but insisted that "there are cases where no search-warrant can lie," and yet the magistrate may search, or may direct others to make the search. He referred to the usage of the

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department to search for, and seize the stamps, dies, and bills of counterfeiters, the false keys of burglars, the weapons and garments of murderers. He denied that he had threatened to search among the private papers of Pierce, to obtain evidence of the crime of the latter, but relying upon the *usage*, had threatened to search to obtain evidence to establish the crime of Glentworth and other conspirators.

The defense of Recorder Morris was, by Governor Seward, referred to Attorney-General Willis Wall for an opinion, which was given January 11th, 1841. From this opinion, as much is given as affects the question now under discussion, as to whether a warrant to search and seize private papers for purposes of evidence, to produce a forfeiture of goods, or a criminal conviction, is permitted or justified. Extracts are appended :

"It is denied (by me) that any law exists in this State authorizing the search for and seizure of private papers. The exercise of such a law is utterly inconsistent with two of the most universal and most cherished principles of the Common Law. The first is, that the house of the peaceable, unoffending citizen is inviolable. . . . The other is, that "no man can be compelled to testify against himself." If a man's private papers can be forced from his possession, no matter whether with or without warrant, if his house can be searched, his trunk and his drawers broken open to furnish evidence against himself, as a criminal accusation, why not apply force to his person? Why not rack his frame, and tear his flesh with pincers, to extort confessions of his acts and his motives, and the thoughts of his heart? The principle is the same. It is in both cases forcing the accused to give evidence against himself. It is the application of the torture. A few cases will show how carefully the courts have guarded against evidence of this kind. In the case of Rex *v.* Lee (1 Wil. 240), the court say : "The rule heretofore granted in this case to inspect the parish-books ought not to have been made, because it was obliging the defendants to produce evidence against themselves, and the maxim that 'no man shall be bound to accuse himself,' has always been so religiously adhered to, that in the case of a witness, if any case be put to him which may affect himself, he shall not answer thereto, although possibly his answer might do complete justice between the parties; so that the law will rather suffer a particular injustice than break through this maxim which would be so generally inconvenient." In the case of Rex *v.* Dr. Purcell (1 Wil. 239), the court refuse a rule requiring the books of the corporation of Oxford to be open for the inspection of the Attorney-General, in an information against Dr. Purcell, the Vice-Chancellor, for

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a misdemeanor. They say: "If this court should grant this rule, it will, instead of doing justice, lay the foundation for something like an *inquisition of State;* for this court sits to hear evidence, not to furnish it."

In the case of Rex *v.* Dixon, decided 3 Burn. 1687, a *subpœna duces tecum* was issued to give evidence before a Grand Jury, and to produce three vouchers, which had been produced and insisted upon by one Mr. Peach, the defendant's client, before a master in chancery, and this subpœna with the *duces tecum* was in order to found a prosecution by way of indictment against Peach, who had produced these vouchers before the master, for forgery. Mr. Dixon refused to appear. On motion for an attachment, Lord Mansfield was clearly of opinion that "Mr. Dixon was not compellable to deliver up these papers against his client, and that instead of producing them against his client, he ought, immediately upon receiving the *subpœna duces tecum*, to have delivered them up to his client." So in the case of Holden & Ray *v.* Harvey (4 Bur. 289), Lord Mansfield says: "That in civil cases, the court will force the parties to produce evidence which may prove against themselves, or leave the refusal to do it as a strong presumption to the jury; but in a criminal or *penal* case, the defendant is never forced to produce any evidence, though he should hold it in hands in court." So vitally important is this protection deemed, that the declaration, "No man shall be compelled, on any criminal case, to be a witness against himself," is inserted in the Constitution of the United States, repeated in the constitution of this State, and reiterated in our own Bill of Rights. . . . The Recorder, therefore, who has exercised this power of search and seizure of private papers, and declared his intention to continue to exercise it, is bound to show some precedent or authority in law for so doing, and this he has attempted to do. He cites several cases, as 2 Stark, Rep. 284; 1 Leach, 235; Warson's case, 2 Stark, 140, 137; Robinson's case for murder of Ellen Jewett; Townsend's cases for maiming with vitriol; Lazarus' case for forgery; Phebe Ann Floor for murder; and he might have cited many more, where paper or other articles found on the persons or in the possession of the accused have been used, on their trial, as evidence against them without objection. If objection had been made, the authority of the cases would have been the stronger. But why has not objection been made? Not because nobody ever doubted the right to search for and seize private papers, but because nobody ever doubted that if the evidence was pertinent and legal, the court would not and could not form a collateral issue to ascertain how it was obtained. And even if the illegal manner of obtaining it were admitted, it would form no legal objection to the testimony, and the court could not, on that account, reject it. This principle was fully recognized in the case of Jordan *v.* Lewis (14 East., 304, note), and Leggett *v.* Tollervey, where the papers were not only illegally obtained, but against the express order of the court, and were objected to on that account; yet the court received them, declaring that "they could not take notice in what manner they were obtained." Precisely the same kind of precedents were resorted to by the advocates of arbitrary power in their vindication of general warrants; but Camden and

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Dunning reply the maxim of law, *quod fieri non debet factum valet*, "An unlawful manner of coming by papers will not prevent their being evidence when produced." (See a letter concerning libels, warrants, the seizure of papers, etc., written by Camden and Dunning, 1771, 7th edit., p. 155.) Again, in Entick *v.* Carrington: "And if it should be added that these warrants (to seize papers) ought to acquire some strength by the silence of those courts which have heard them read so often, upon returns, without censure or animadversion, I am able to borrow my answer to that pretense from the Court of King's Bench, which has lately declared, with great unanimity, in the case of general warrants, that as no objection was taken to them upon the returns, and the matter passed *sub silentio*, the precedents were of no weight." The class of cases, therefore, referred to by the Recorder does not, directly or indirectly, involve *the principle*, and proves nothing. . . . But if the argument of convenience or necessity is to be allowed, let it at least be restricted to the case in question, the case of seizure of papers. The law has very carefully provided and described the manner of bringing papers which are evidence in any civil or criminal case before the court. If one party desires to use as evidence, papers in the possession of the other party, he must give notice to produce them, and if not produced, he may give parol evidence of their contents. The case of Rex *v.* Watson *et al.* (2 T. R. 199) was an application on a criminal information for a libel, consisting in a certain resolution and order entered in corporation books. Buller, J., said, "It has been solemnly determined, that in a criminal prosecution you may give notice to a defendant to produce a paper in his possession, and if he refuses you may give other evidence of it." The case of the State *v.* Kinehough (2d Devereaux, No. Cor. Rep. 431) was a case of murder, and notice was given the prisoner to produce sundry papers, and on refusal, parol evidence of their contents was admitted. But so far was the right of search and seizure of papers in this case from being admitted, that the counsel for the prisoner strenuously objected even to the admission of any evidence of their contents. The court say: "This secondary evidence was properly received, because it was the best evidence in the possession of the prosecution. It is the same thing (*i. e.*, the possession of the papers, by the accused) as if the *primary was actually destroyed.* The principle of the common law, that no man shall be compelled to give evidence against himself, sanctioned by the Bill of Rights, protects the defendant in the possession of the primary evidence. The object of the notice is not to *compel* the production of the paper (*for no such power is assumed*, either directly or indirectly), but placing him under a disadvantage if he does not produce it."

The case of the United States *v.* Britton (2 Mason 464) was a case of forged notes, remaining in the hands of the forger. The District Attorney did not ask Judge Story for a warrant to search for and seize them, nor did he even ask the venerable judge to descend from the bench and go and seize them himself. He simply desired to describe the notes generally in the indictment, and be permitted, after notice to the prisoner to produce the originals, to give evidence of their contents, which the court permitted him to do. These cases, and hundreds of others which might be adduced, show most clearly what is

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the established practice when the papers are in the actual possession of the accused . . . All the decisions which have been made respecting the illegality of warrants to authorize the search for and seizure of private papers are at least equally damnatory of all magisterial searches and seizures in similar cases. The objection is to the power, not to the evidence of the power. We may, therefore, without the least danger of error, consider the authorities which we now propose to examine on the subject of such warrants, as applicable in all their force to the present case. Lord Coke says (4 Just. 177): "For justices to make warrants, upon surmises, for breaking in the houses of any subjects, to search for felons or stolen goods, is against Magna Charta. For though commonly the houses or cottages of poor and base people be by such warrants searched, yet if it be lawful, the houses of any subject, be he never so great, may be searched upon such warrant upon bare surmises."

Lord Camden says (19 State Trials, 1067): "The case of searching for stolen goods crept into the law by imperceptible practice. It is the only case of the kind that is to be met with." Here is the authority of two mighty names, that the rights of search was unknown to the Common Law, in any case whatever. The first record of search-warrants for any thing but stolen goods originated in the Court of Star Chamber, in the time of Elizabeth. It was then first used to search for libels and unlicensed books, continued to be so used until the abolition of that tyrannical and oppressive court. (19 State Trials, 1069.) Instances are found of the exercise of this power in the Court of King's Bench, in trials for high treason, in the time of the Stuarts. Indeed, most of the judicial murders perpetrated by Jeffreys and by Scroggs were effected by means of private papers, found on breaking open drawers and trunks in possession of the victims. Such was the case of Algernon Sidney, whom History, recording the verdict of Time, has pronounced "a patriot, a philosopher, and a Christian." He was tried by the execrable Jeffreys, and condemned and executed for high treason; and the principal evidence against him were certain private papers found in his closet, and seized by a warrant from the Secretary of State, in which he asserts the treasonable doctrine that the power of the king is derived from the people! (See trial of Algernon Sidney, 9 State Trials.) Such was also the case of Edward Coleman, a Catholic priest. His home was searched, his boxes and escritoirs broken open, and his papers seized, by virtue of a search-warrant from the King's Council. He was tried before Chief Justice Scroggs for high treason, and sentenced "to be hanged by the neck, and cut down alive, his bowels burnt before his face, and his quarters severed, and his body disposed of as the king thinks fit." The evidence on which this barbarous sentence was founded consisted (except that of the notoriously perjured Titus Oates) in certain old letters, bearing date several years before, violently taken from his possession, and which related exclusively to the advancement of the Catholic religion in England. (Trial of Edward Coleman, 7 State Trials.) Soon after, William Ireland, Thomas Pickering, and John Grove, Catholic priests, were tried at the Old Bailey, before the same judicial monster, Chief Justice Scroggs, and convicted and executed on the same kind of evidence,

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obtained in the same violent and lawless manner. Many similar cases might be referred to in the reigns of Charles and James, and many in later times; but in no one of them was the question of the *legality* of the seizures of the papers made or discussed, nor can any such case be found, until the great case of Entick *v.* Carrington, decided in the King's Bench in 1765, in which *the seizure of private papers was declared by all the judges to be illegal.* The eleventh section of our Bill of Rights is an attempt to embody a principle. It is not so much in the nature of an act of legislation, as it is of constitutional limitation of legislative power. It is not directed against search-warrants, but against the right of search. . . . Acting in the spirit of this provision, the legislature have authorized searches in certain specified cases, and carefully prescribed the manner in which it shall be done. But they have not thought that a search for or seizure of *private papers* was "reasonable," and in no case have they authorized it to be done. The act, therefore, of the Recorder, in seizing these papers, is a manifest usurpation of a power authorized by no law, and which has been exercised in a manner in direct violation of the Bill of Rights.

After hearing the Recorder in defense of his conduct, and the opinion of the Attorney-General therein, the Governor, in a special message to the Senate, recommended that Mr. Morris be removed from office.* In this message, Governor Seward said:

"After very mature deliberation on the subject, I am satisfied that, in the case in which the proceedings occurred, any search-warrant for the private papers of the accused, which papers were not alleged to have been feloniously or unlawfully acquired, would have been a violation of the most sacred private rights, and of the most cherished principles of civil liberty; and that the seizure of the papers in such a case, by a judicial officer, without warrant on oath, was more aggravated than the issue of a search-warrant would have been, because it was a mixture of judicial and executive functions derogatory from the station of the judge, and dangerous to the personal rights of the citizen."

The Senate, which at that time constituted a part of the Court of Errors of the State, assented to the recommendation and removed the Recorder.

The especial value of this case consists in its being a complete answer to the advocates of the present Seizure Law. It confirms the position taken in this pamphlet, that *private papers, not feloniously acquired, can not be searched for*

* Baker's Seward, vol. 2, p. 388.

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*and seized, for the purpose of using them against an accused party*, whether charged with a criminal offense or of one only of a penal nature.

Waiving further discussion of the bearing upon the Seizure Law of the constitutional provisions that property shall not be taken except by "*due process of law*," and that no "*unreasonable*" seizures shall be made, brief notice will be given to that clause of the Constitution which requires that warrants shall *particularly describe* the things to be seized.

The practice in this city is to issue a warrant authorizing the seizure of *all books of account and papers relating to certain specified importations.* No further identification of the books to be taken is given, than this general reference to their connection with certain invoices. When the marshal executes the warrant, he is in utter ignorance what books and papers relate to the specified invoice, and, not knowing which to take, he naturally errs in favor of the Government, *and takes all.* In this way, it happens that a warrant which calls for the books and papers relating, it may be, to a single invoice, transfers from the counting-room of the importer, to the office of the seizing official, every book and paper connected with the importer's business, and covering his entire mercantile transactions, as well as such private transactions as chance to be recorded, or to be found. Whether a warrant, so worded as to result in such a seizure, can be considered as "*particularly describing*" the things to be seized, is, perhaps, as much a question of common-sense as of law. If such a warrant is authorized by one of our statutes, there is room to doubt whether this is indeed a country of liberty. If it is a land of liberty, we must believe, with Fitz-James Stephen, that liberty, in itself, is neither good, nor bad, but indifferent, and that nothing can be predicated of it *before one knows what use is going to be made of it.*

Thus far these objections to the Seizure Law have mainly

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had reference to its unconstitutionality. Attempt has been made to show that the law violates the Amendments to the Constitution, and is against the spirit and letter of the Common Law. It debauches public morals, and unsettles the first principles of our jurisprudence. It destroys the poise and restraint established by our organic law, and teaches the incoming generation pernicious and destructive doctrines as to the meaning, and as to the limitations of Constitutional Government. History and authorities combine against it. The Secretary of the Treasury himself admits its unwisdom, his letter of January 10th, to the Senate Committee on Commerce, containing the following:

"Another measure which I deem of much importance, as affecting the administration of the Customs system, is an amendment of the existing law for seizing books and papers. This law . . . *being open to objection upon constitutional grounds*, should be so guarded as to avoid any danger of its being oppressively used."

Senator Boutwell, when Secretary, urged in similar language, in a letter in 1871, to a Senate Committee, an amendment of the same Statute.

This law, however, has its friends and defenders, *especially among those who share in the penalties*, and, as the argument here made against it may be denied, it is proper to indicate in what respect the law should be amended, if it is impossible to obtain such a hearing as will insure its total repeal.

The Law, as it now stands, authorizes the seizure of books and papers upon an *ex parte* affidavit, made, as is the custom in most cases, by the informer, or his representative. This party has a pecuniary interest in the result of the seizure, amounting, under the law, to one quarter of the amount recovered. Considering that interest, and the moral turpitude of a man who is willing to become an informer, is it too much to believe that his affidavit may not

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be honestly made? If the seizure of the books discloses a fraud, he reaps a reward; if they disclose no fraud, his name may never appear, and he is free from the possibility of punishment. The affidavit itself is a statement not sworn to upon *positive knowledge*, but simply upon *information and belief*—a kind of affirmation which furnishes an outlet, by enabling the affiant to fall back upon the irresponsibility and indefiniteness implied. Ordinarily the affidavits are made by what may be called the *professional informer*, a party who represents the real informer, receiving from him a part of the informer's moiety, and who swears to whatever is told to him. It is not impossible that business competitors or personal enemies, may, for the purpose of crushing a rival, either stimulate an informer, by an adroit manipulation of utterly false statements, or bribe him by a cash payment or a guaranty of an informer's moiety. If books are to be seized, the affidavit should be either made or approved by a Revenue officer of the Government occupying a responsible position, *and he should be held pecuniarily responsible for its abuse.*

There is no provision in the law as to what books shall be taken. As the law now reads, this can not, in the nature of things, be determined with precision. In a recent case in Boston, Judge Lowell held that the law *impliedly* justifies the seizing of the entire contents of the office, but that an examination should be made, by other persons than those designated to search for the alleged frauds, with a view of determining what particular books relate to the alleged frauds, and of returning to their owner all others. In this city there is no such rule, and, with us, all the books are taken and are turned over, for examination, to the officers who originate the seizure, that is, to the Customs Authorities, or to the Special Agents of the Treasury Department.

Books seized under the allegation of specific fraud, fre-

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quently reveal other frauds, in addition to those contained in the affidavit. In some cases, the original allegation is found to be entirely groundless, but other and unsuspected irregularities are disclosed by the books. In these cases, it is the custom to make the same use of these frauds and irregularities, thus discovered, that would have been made of them had they been suspected and searched for in the first instance. Upon trial, the fact that the Government obtained its knowledge by such disreputable means, can not be introduced, the well-established rule of law being that courts will not take notice how evidence is obtained, whether lawfully or unlawfully, nor will they form an issue to determine that question.* If among the mass of papers seized, there chance to be any writings of a *purely personal nature*, disclosing secrets which, if known, might cast a stain upon character, a skillful use may be made of them to extort the penalty, and enforce a settlement.

The present law is further deficient, in that it fails to designate the time within which the examination shall be made. Books are now examined at the convenience of the Seizure Department, and are retained for an *utterly indefinite period*. During this time, the alleged offender has no legal rights, with reference to his access to his own books, being thrown entirely upon the good-will of the officials. In the experience of the writer, the government officials act in this respect with uniform courtesy; but it is, nevertheless, humiliating to a citizen to rely upon charity where he has a constitutional right. Whether there are losses, mutilations, alterations, or suppressions, the merchant has no means of knowing. In this regard, he is thrown entirely upon the honesty of the very men whose pecuniary interest and official pride are enlisted against him.

So numerous and so vital are the objections to this

* Green. on Evid. 1, § 254, a.



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law, wise by accident and bad by design, that it is with difficulty a single word can be said in its favor. Certainly, upon the general principles involved in its enforcement, a reflective mind can reach but one conclusion, that it savors of despotism and not of freedom, and that nothing can more forcibly illustrate an oft-reiterated saying, uttered in the first instance by so venerable an authority as Aristotle, that there are many striking points of resemblance between a Tyranny and a Republic.

The terrible possibilities that may arise, and often do arise, from the easy abuse of this law, are appalling. Confidential clerks inform against their employers, and reap the rich money reward of the informer. There are instances on record where employees have purposely committed mistakes, and intentionally falsified records, for the deliberate purpose of subjecting their employers to penalties, in which they, as informers, were to share. Buyers sent abroad by importing houses become the paid agents of professional informers, for whom they collect prices, price-lists, samples, and business secrets, for the purpose, it may be, of entrapping the very houses they represent. Certain Revenue offices become shops where betrayed confidences are bought, and some officials become brokers in the perfidy of partners and friends. It may be said, *such experiences are necessarily incident to tariffs!* To this it may be replied, that such experiences are rendered *possible* under the tariff laws as they now exist; but that tariffs, the collection of duties, and the rights of importers, can all exist together under proper laws. But no system should be tolerated that prepares the way for arbitrary seizures, by first inviting the formation of corrupt conspiracies. Can any thing tend more swiftly to prostitute business, and to debauch public morals?

Into the limitation of the period within which searches for fraud may be made, it is not the province of this dis-

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cussion to enter. That limitation has been, at different times, respectively two years and three years, while now it is five. How many importers can be found in whose books, considering the present complexity of the Revenue Laws, some mistake or irregularity, sufficient to subject them to a charge of fraud, can not be found, going over the full records of their business for the period of five years?

Take the case of a consignee, for example, which is perhaps of more than ordinary hardship, under the limitation now existing. In his case, he receives the goods in good faith, with the charges that are sent to him by the consignor, makes the necessary affidavits in full belief that he is stating the truth, pays the duties, receives his goods, and puts them upon the market, realizing as his compensation the small percentage allowed him by the consignor. Within five years afterward, his books and papers may be seized for some trifling irregularity or technical violation of the law with reference to some other matter, and the skilled examiner at the Custom House may discover, with reference to the old consignment, some flaw which may subject him to the payment of a penalty that may cause his financial ruin, especially if, during these years, the consignor has become himself irresponsible, and the consignee can not look to him to be reimbursed. Such an instance as this may arise even where the consignee acts in the most perfect good faith, from the fact, as has been already set forth, that the Revenue Laws abound in such complexities as render them oftentimes a trap to the best-intentioned importer. Considering that the Government *has the goods in its own hands*, and practically in its own possession, *when they are landed*, and that it has an extraordinary force of employees, each skilled in his own specialty, to take charge of, inspect, and appraise the goods, and that it undertakes, *then and there*, to say to the importer what shall be his duties, and does not release his goods until those duties are paid, does

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it not seem needlessly oppressive to reserve to itself *five years* within which to correct errors which, in most cases, *it should have discovered at the time*, and to call upon the importer for a penalty for a breach of the law, which should have been pointed out to him *at the date of the importation ?* If such fearful penalties, as are now imposed, are to follow technical infractions of the law, the limit within which the importer may be subject to them should be reduced.

The subject of moieties is also hardly pertinent to this discussion, and little, therefore, will be advanced with reference to that system, further than the following extract from the report, for the year 1869, of the Honorable Hugh McCullough, then Secretary of the Treasury. With reference to the shares in penalties distributed among the Revenue officers and the informer, the Secretary expressed himself as follows:

"The reason on which the laws granting such allowances are based, is that officers of the Government are stimulated to greater activity in the discovery of frauds, and in bringing offenders to punishment. There can be no doubt that such is the effect of the policy, but the experience I have had in the Treasury Department has convinced me that *the evils attending the system are greater than the benefits derived from it.* It often occurs that Revenue officers are led to assert claims, in behalf of the Government, which have no just foundation in law, or in the facts of the respective cases; and, where real claims exist, it is often the object of the informers and officers, who share in the penalties, to misrepresent the case to the Department, so as to secure the greatest advantage to themselves. But a more serious evil is found in the practice, quite general, of *allowing persons to pursue a fraudulent course* until a result is reached which will inure to the benefit of the officers and informers, *instead of checking criminal practices at the outset.*

Upon this same subject, The Honorable George S. Bout-

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well, when Secretary of the Treasury, in his report for the year 1871, remarked:

"It is my duty to call the attention of Congress to the importance of abolishing the system of shares and moieties as far as the benefits inure to Revenue officers and other persons officially connected with the Government. . . . In most of the cases, the officers do not perform special services entitling them to the amounts granted, and importers and others, whose acts are made the subject of investigation, complain, and I think with just reason, that the agents of the Government have a pecuniary interest in pursuing those charged with violations of the law. . . . One of the difficulties which the Department has to meet, frequently is, that the Customs officers have an interest in the proceedings for the discovery of fraud, the settlement of cases, or in the prosecution of them, *which is different from the real interest of the Government*, and, as a necessary result, the conduct of such officers is open to suspicion, both on the part of those who are pursued by them, and the Government they ostensibly represent."

The present Secretary, in a communication just published, says: "While I am prepared to accede to the general principle of the present bill, by the *abolition of all moieties*, except in the case of smuggling, actual or attempted, I am of opinion that there should be some inducement for the exposure of offenses more complicated in their nature, and hence more difficult to trace. I would, therefore, recommend that provision be made for a special fund, to be exclusively used, under suitable restrictions, for the compensation of private persons who may enable the Government to detect and punish frauds that would otherwise, in all probability, remain undiscovered."

In the Majority Report of the Senate Committee on Retrenchment, submitted June 4th, 1872, there occurs the following language bearing on this point:

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